UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 **(Consolidated)**
	§	CLASS ACTION
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
ENRON CORP., et al., Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
KENNETH L. LAY, et al., Defendants.	§	

PLAINTIFFS' SUR-REPLY IN FURTHER OPPOSITION TO MOTION TO RECONSIDER THE COURT'S APRIL 5, 2004 ORDER RE: J.P. MORGAN DEFENDANTS (DOCKET NO. 2120)

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In its Reply, for the first time, JP Morgan submits an extensive chart comparing plaintiffs' allegations in this action with the allegations made by St. Paul Fire & Marine Ins. Co. in its counterclaim against JP Morgan Chase Bank (the "Counterclaim"). JP Morgan asserts: "This chart demonstrates that nearly every allegation Plaintiffs ultimately advanced with respect to the Mahonia prepay transactions was disclosed by December 22, 2001." Reply Brief in Further Support of Motion to Reconsider the Court's April 5, 2004 Order Re: J.P. Morgan Defendants ("Reply") at 5-6 and Schedule A. In a rhetorical sleight of hand, JP Morgan asserts these purportedly "publicly disclosed" "facts" amounted to storm warnings notifying plaintiffs ***JP Morgan*** falsified Enron's financial results. *Id.* at 6-7. Lead Plaintiff respectfully submits this Sur-Reply to JP Morgan's new (and misleading) argument.

First, the similarity of allegations supporting different claims to redress different wrongs visited upon different parties does not, in and of itself, support an assertion that notice of one claim presents "storm warnings" of the other, dissimilar claim. However, in its zeal to assert such an argument, JP Morgan omits from its Reply any reference to the distinct allegations in plaintiffs' First Amended Consolidated Complaint concerning Mahonia. Those omitted allegations are what distinguish plaintiffs' claims for securities fraud upon Enron's investors from St. Paul's claims for insurance fraud (among others). For example, whereas the Counterclaim nowhere alleges that JP Morgan created the Mahonia prepays to falsify Enron's reported financial results (or even asserts that the Mahonia prepays violated Generally Accepted Accounting Principles), plaintiffs plead such distinct additional, critical facts. *See, e.g.*, First Amended Consolidated Complaint ¶564 (Mahonia prepays overstated Enron's revenues and earnings before taxes); ¶664 (JP Morgan secretly controlled the Mahonia SPE in violation of GAAP); ¶667 (prepays closed at quarter and year-end to meet financial targets); ¶668 (the idea for the prepays originated with JP Morgan, not Enron, who charged extraordinary fees for its expertise). Moreover, plaintiffs plead distinct additional facts concerning JP Morgan's role in (and motivation to participate in) the fraudulent scheme not specific to the Mahonia prepays.

Simply comparing portions of the Complaint and the Counterclaim ignores the import of plaintiffs' ***distinct*** allegations and does not carry JP Morgan's burden. *See Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 102-03 (2d Cir. 2003) (overturning district court's dismissal of claims as time-barred despite district court's finding that previous proceedings against the same defendant were "'not all that different from the allegations in the present complaint'") (cited approvingly by this Court in its Feb. 25, 2004 Order at 61). While some descriptions of the Mahonia prepays in the Counterclaim are similar to the descriptions alleged by Lead Plaintiff, JP Morgan overstates the similarity of the allegations and vastly overstates the significance of the matter. Indeed, the counter-claim alleges that Mahonia transactions were not the type of transactions JP Morgan represented, not that the transactions manipulated Enron's financial statements.

Conceding that the Counterclaim nowhere asserts or otherwise exposes that JP Morgan defrauded plaintiffs, as opposed to its own insurance carriers, JP Morgan attempts to resurrect its argument by citing only one article that purportedly suggests the Mahonia prepays might "'raise a host of other questions about Enron's already-tarnished accounting methods.'" Reply at 6-7 (quoting *Platt's Oilgram News*). JP Morgan can point to no other publication prior to January 14, 2002 for this proposition. Further, recognizing that investors are not required to read industry journals such as *Platt's Oilgram News*, JP Morgan asserts: "The article is significant because it demonstrates that the 'storm warnings' before January 14 were sufficient to allow a person exercising reasonable diligence to determine that the claims in the *JP Morgan Chase Bank* Action raised questions about Enron's accounting that are the subject of the allegations here." *Id.* at 7. JP Morgan's argument fails as it misstates the relevant standard. The issue is whether "a reasonable investor of ***ordinary intelligence*** exercising reasonable diligence should have discovered sufficient facts to support filing a securities fraud claim against [***JP Morgan***]." *Levitt,* 340 F.3d at 104 (emphasis added). A journalist for the *Platt's Oilgram News* is an expert, not an investor of "ordinary intelligence."

Moreover, this oil-industry expert clearly did not discover anything remotely sufficient to support a securities fraud claim against JP Morgan by Enron's investors. The *Platt's* article identified no facts nor expressed any opinion concerning whether JP Morgan acted to: deceive plaintiffs (rather than JP Morgan's insurers); falsify Enron's income, debt, or cash flow from operations; or even whether JP Morgan acted with scienter. The article merely opines that ***Enron's*** accounting for the prepays might have been wrong, not that ***JP Morgan*** created and structured the Mahonia prepays to ***appear*** to comply with relevant accounting rules for the express purpose of falsifying Enron's financial disclosures to deceive investors. Nothing in either the Counterclaim or in the *Platt's* article even remotely suggested purchasers of Enron securities had a claim against JP Morgan. Accordingly, JP Morgan's statute of limitations argument must fail.[1]

DATED: May 7, 2004

Respectfully submitted,

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1 Even assuming, *arguendo*, the Counterclaim created "storm warnings" (it did not), the limitations period still did not begin to run until after January 14, 2002. The Counterclaim contained ***allegations***, not ***facts***. Plaintiffs and Lead Counsel had to investigate the veracity of these allegations and determine whether the alleged conduct harmed plaintiffs. As JP Morgan admits (Reply at 4 n.2), the statute of limitations does not "'begin[] to accrue on the date that sufficient storm warnings first appear'" but only upon the later date after "'an investor, alerted by storm warnings'" exercises reasonable diligence to investigate and the fraud is "'discovered.'" Feb. 25, 2004 Order at 29 (quoting *Young v. Lepone,* 305 F.3d 1, 9 (1st Cir. 2002)). Investors of ordinary intelligence exercising reasonable diligence could not (and did not) discover JP Morgan's fraud as to plaintiffs until after January 14, 2002. "Depending on the individual circumstances, a reasonably diligent investigation following the receipt of storm warnings may consume as little as a few days ***or as much as a few years to get to the bottom of the matter***." *Young*, 305 F.3d at 9 (cited approvingly by this Court).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' SUR-REPLY IN FURTHER OPPOSITION TO MOTION TO RECONSIDER THE COURT'S APRIL 5, 2004 ORDER RE J.P. MORGAN DEFENDANTS (DOCKET NO. 2120) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this May 7, 2004.

I further certify that a copy of the foregoing PLAINTIFFS' SUR-REPLY IN FURTHER OPPOSITION TO MOTION TO RECONSIDER THE COURT'S APRIL 5, 2004 ORDER RE J.P. MORGAN DEFENDANTS (DOCKET NO. 2120) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this May 7, 2004.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004

Mo Maloney

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